ruling. The Supreme Court held, however, that there was no error, for while the plaintiff had not waived his privilege by going on the stand himself, yet even if he had refused to allow his attorney to testify, this would have been a proper subject of comment and inference by the jury. *McCooe* v. *Dighton R. R. Co.*, 53 N. E. Rep. 133 (Mass.).

It cannot be doubted, however, that the two positions taken by the court are logically inconsistent, for if the party still has his privilege, then no inferences should be allowed from his asserting it. This seems to be the English law to-day. *Wentworth* v. *Lloyd*, 10 H. L. C. 589; see also *Bigler* v. *Rehler*, 43 Ind. 112. In this country the point is not settled. In criminal cases there is a square conflict, some courts holding that the defendant waives all his privileges by going on the stand, and others that he waives none. Compare *Commonwealth* v. *Nichols*, 114 Mass. 285, and *Chesapeake Club* v. *State*, 63 Md. 446. In civil cases there seems to be very little authority on the point, and it is doubtful how far the principal case would be followed. While not logical, it takes, in the actual result reached, a convenient position between the two extremes of complete waiver of all privileges and waiver of none, with no inferences to be drawn. The party is protected in that he is not obliged to give evidence tending to incriminate himself, nor can his attorney without his consent give evidence which might subject him to a prosecution for perjury, and yet his opponent is not made to suffer by the exercise of this safeguard, and the merits of the case are made to appear directly or by a legitimate inference. For these practical reasons the decision seems satisfactory and may very probably be followed.

RECENT CASES.

AGENCY — INSURANCE POLICIES — WAIVER OF CONDITION. — An insurance agent accepted overdue premiums from the insured in several instances. *Held*, that forfeiture for non-payment of a premium when due may be thus waived although the policy expressly states that no waiver shall be valid unless in writing signed by an officer of the company. *James* v. *Mutual Life Assn.*, 49 S. W. Rep. 978 (Mo.).

A contrary result has been reached in the case of an express waiver, by an agent, on the ground that knowledge by the insured of the terms of his policy is to be presumed, and that therefore the principal cannot be held since the agent has clearly exceeded his authority. *Smith* v. *Niagara Ins. Co.*, 60 Vt. 682; *Quinlan* v. *Providence Washington Ins. Co.*, 133 N. Y. 356. The decisions in accord with the principal case do not question this well settled doctrine of agency, but either decide that such a restriction in a policy is inoperative because inconsistent with the rule of law that there may be a waiver by parol, or find an estoppel arising independently of the agent's authority. *Dwelling House Ins. Co.* v. *Dowdall*, 55 Ill. App. 622; 1 Joyce, Ins., § 439. The exact ground of the decision in the principal case is not clear, but it may well be supported on the second reason suggested. The insurer must have known of the overdue payment of the previous premiums, and having made no objection, should be estopped from insisting on the forfeiture.

AGENCY — UNAUTHORIZED CONTRACT — LIABILITY OF AGENT. — The defendant, as agent of R., entered into an unauthorized contract with the plaintiff, which R. repudiated. *Held*, that the defendant is liable to the plaintiff on an implied warranty of authority. *Cochran* v. *Baker*, 56 Pac. Rep. 641 (Oreg.).

The weight of authority is in favor of this view of the agent's liability as to unauthorized contracts. *Collen* v. *Wright*, 8 E. &. B. 647; *Baltzeu* v. *Nicolay*, 53 N. Y. 467. But as the point is a new one in Oregon, it is to be regretted that the court did not adopt a rule more in accord with the real nature of the transaction. It is hardly logi-

cal to imply a contract between the supposed agent and the third party which neither intended to make. Moreover, such a step is unnecessary, for there is no valid reason why the agent should not be held in an action of tort for his false representation of authority. Unfortunately this view has found little support though it has been suggested in several cases. *Jefts* v. *York*, 64 Mass. 392, 395; *May* v. *Western Union Tel. Co.*, 112 Mass. 90, 94. The importance of ascertaining the true nature of the liability is apparent when it is remembered that the damages may differ considerably if the wrong is regarded as a tort rather than a breach of contract.

AGENCY — VICE-PRINCIPAL. — The appellee's husband, an employee of appellant, was killed by the negligence of another employee whom it was his duty to obey. *Held*, that a servant does not assume risks growing out of the negligence of vice-masters whom it is his duty to obey. *Fort Worth Ry. Co.* v. *Wrenn*, 50 S. W. Rep. 210 (Tex., Civ. App.).

This doctrine finds considerable support in this country. *Little Miami Ry. Co.* v. *Stevens*, 20 Ohio, 415; *Union Pacific Ry. Co.* v. *Doyle*, 50 Neb. 555. But it has never been recognized in England; and since the case of *Baltimore & Ohio Ry. Co.* v. *Baugh*, 149 U. S. 368, it appears to be losing ground in America. According to the better view, the master's liability depends upon the character of the duty being performed by the negligent employee, irrespective of any question of his control over the injured party; and can only arise where the duty is one which the master owes his employees and has delegated to one of them. *Jackson* v. *Norfolk & Western Ry. Co.*, 43 W. Va. 380; *Crespin* v. *Babbitt*, 81 N. Y. 516. The mere fact that one employee holds a lower position than another in the common employment can hardly be considered sufficient to take the case out of the operation of the fellow-servant rule; but where the master owes a duty to his employees, it is clear that he cannot escape liability by delegating it to one of them.

BANKRUPTCY — COMMON LAW ASSIGNMENTS. — The bankrupt had, before the adjudication, made an assignment of all his property for the equal benefit of his creditors under a Missouri statute regulating such assignments. *Held*, that although this statute is not superseded by the United States Bankruptcy Act, the trustee in a subsequent bankruptcy may recover the assigned estate from the assignee. *Davis* v. *Bohle*, 92 Fed. Rep. 325 (C. C. A. Eighth Cir.).

This decision having been made by the Circuit Court of Appeals may be regarded as a final disposition of a question which has already been several times before the District Courts with a like result. *Re Gutwillig*, 90 Fed. Rep. 475; *Re Bruss-Ritter*, 90 Fed. Rep. 651; *Re Sievers*, 91 Fed. Rep. 366. The United States Bankruptcy Act expressly provides that the trustee can recover such common law assignments as are fraudulent conveyances or fraudulent preferences, § 70; but it fails to provide that the usual assignment, which is neither, can be so recovered. This omission had to be supplied by construction. An obviously sound result has been reached. It leaves the assignment its proper place in the law of insolvency; but keeps it in its due subordination to bankruptcy. See 12 HARV. LAW REV. 503.

CARRIERS — SPECIAL CONTRACT — BURDEN OF PROVING NEGLIGENCE. — A mule was shipped under a special contract exempting the carrier from liability from any cause but negligence. The mule died in transit. *Held*, that the burden is upon the carrier to prove his own due care. *Mitchell* v. *Carolina, etc. Ry. Co.*, 32 S. E. Rep. 671 (N. C.).

Cotton was shipped under a special contract exempting the carrier from loss by fire. The cotton was destroyed by fire in transit. *Held*, that the burden is upon the shipper to show negligence on the part of the carrier. *National, etc. Ins. Co.* v. *Erie, etc. Ry. Co.*, 53 N. E. Rep. 382 (Ind.).

A carrier may limit his absolute common law liability by special contract; but no contract can exempt him from liability for loss by his negligence. *New York, etc. R. R. Co.* v. *Lockwood*, 17 Wall. 387; *Hoadley* v. *Northern, etc. Co.*, 115 Mass. 304. The principal cases represent a direct conflict of authority, the question being whether, when a loss is *prima facie* covered by the exemption, the burden is upon the carrier to show due care or upon the shipper to prove negligence. Many states hold with the first principal case. *Louisville, etc. R. R. Co.* v. *Touart*, 97 Ala. 514; *Erie R. R. Co.* v. *Lockwood*, 28 Oh. St. 358; *Chicago, etc. R. R. Co.* v. *Moss*, 60 Miss. 1003. On the other hand the weight of authority is with the second. *Western, etc. Co.* v. *Downes*, 11 Wall. 133; *Cochran* v. *Dunsmore*, 49 N. Y. 249; *Pennsylvania R. R. Co.* v. *Rawdon*, 119 Pa. St. 577. The cases for the shipper are generally supported upon the weak reason that the facts lie peculiarly within the knowledge of the carrier. But the cases for the carrier rest upon the fundamental principle that he who would charge another with loss by negligence must prove it. Moreover, if the courts allow the carrier upon grounds of policy

to contract out of his common law liability, they cannot arbitrarily place this burden upon him without defeating their object. Accordingly, the second principal case is to be preferred.

CONSTITUTIONAL LAW — SEVENTH AMENDMENT — JURY TRIAL. — A civil action for damages was brought before a justice of the peace of the District of Columbia. An Act of Congress had given such court jurisdiction, allowing the justice of the peace to summon a jury, and providing for appeal to the Supreme Court of the district, with another jury. A writ of *certiorari* was issued by the Supreme Court of the district directing a removal to a common-law court. On quashing the writ, *held*, that the trial by the justice's court was not a trial by jury within the Seventh Amendment, and that the jury trial before the appellate court was not unduly interfered with by the trial before the justice of the peace. *Capital Traction Co.* v. *Hof*, 19 Sup. Ct. Rep. 580. See NOTES.

CONSTITUTIONAL LAW — WAR REVENUE ACT. — The War Revenue Act of 1898 imposes a tax on "each sale, agreement of sale or agreement to sell any products or merchandise, at any exchange or board of trade, or other similar place." *Held*, that the tax is constitutional. *Nicol* v. *Ames*, 19 Sup. Ct. Rep. 522. See NOTES.

CONTRACTS — CONSIDERATION — FORBEARANCE. — *Held*, that a forbearance to sue upon a groundless claim is a sufficient consideration to support the promise of a third party to pay the amount claimed. *Di Iorio Di Biazio*, 42 Atl. Rep. 1114 (R. I.).

The court here adopts a doctrine which was first laid down with respect to cases of this kind in *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449. There is no intimation in the opinion of the court that to constitute a sufficient consideration to support a promise the thing done by the promisee must be a legal detriment to him. The case is, therefore, directly in line with the position taken in 12 HARV. LAW REV. 515, that in the present state of the authorities consideration should be defined to be "any act or forbearance by one person given in exchange for the promise of another." See 12 HARV. LAW REV. 276.

CONTRACTS — CONSTRUCTION. — A written contract required the plaintiff, an actress, "to render services at any theatre" of the defendant. It was contended that at the time of making the contract this was agreed by the parties to mean services in a particular part. *Held*, that this cannot be shown. *Violette* v. *Rice*, 53 N. E. Rep. 144 (Mass.). See NOTES.

CRIMINAL LAW — DOUBLE JEOPARDY. — In a trial for the illegal disinterment of a human body the defendant pleaded a former acquittal on a charge of malicious destruction of the coffin. *Held*, that this is no bar to the prosecution. *State* v. *Mazone*, 56 Pac. Rep. 648 (Oreg.).

A contrary result has been reached where "the proof shows the second case to be the same transaction with the first." *Roberts* v. *State*, 14 Ga. 8. The principal case, however, is in accord with the better view, in holding that if no one act is a necessary ingredient of both offences there may always be a prosecution for each. *Josslyn* v. *Commonwealth*, 47 Mass. 236; *State* v. *Warner*, 14 Ind. 572; *Commonwealth* v. *McShane*, 110 Mass. 502. Either of the offences charged might, in legal contemplation, have been committed without committing the other, and therefore trial for the one cannot be said to have purged the defendant of the guilt of any essential ingredient of the other.

CRIMINAL LAW — INTERSTATE RENDITION. — The plaintiff-in-error was tried for arson in West Virginia after being extradited from Illinois. On application for *habeas corpus*, he claimed that he was not in West Virginia when the crime was committed. *Held*, that the writ was rightly refused, presumptive proof that the relator was in fact a fugitive being sufficient. *Eaton* v. *State of West Virginia*, 91 Fed. Rep. 760 (C. C. A., Fourth Cir.). See NOTES.

CRIMINAL LAW — PARDON PENDING APPEAL. — The defendant, pending an appeal from a judgment of conviction, accepted the governor's pardon. *Held*, that he is not entitled to review that part of the judgment assessing a fine and costs against him, since the acceptance of a pardon is an admission that he was rightly convicted. *Manlove* v. *State*, 53 N. E. Rep. 385 (Ind.).

The court held that this case was governed by the rule that a person who has accepted a benefit based on the correctness of a judgment is thereafter estopped from questioning it. *Bennett* v. *Van Syckel*, 18 N. Y. 481. *Waddingham* v. *Waddingham*, 27 Mo. App. 607. The application of this principle to the present facts seems improper, for, according to the true view, it is applicable only to civil suits, and then only when the judgment is in favor of the appellant. 4 Wait, Pr., 216. The decision may, however, be supported on the ground that a party will not be permitted to occupy an

inconsistent position before the law. If he cannot be compelled to submit to a judgment if found against him, he should not have the benefit thereof if in his favor. *Wilson* v. *Commonwealth*, 10 Bush, 526; *Norton* v. *Commonwealth*, 88 Ky. 501.

DAMAGES — CONTRACTS — PROFITS — *Held*, that the recovery of profits lost as damages for breach of contract is governed by the same rules as the recovery for other damages. *Central Trust Co.* v. *Clark*, 92 Fed. Rep. 293 (C. C. A., Eighth Cir.).

The court simply applies with extreme strictness the accepted rule which limits the consequential damages for a breach of contract to those within the contemplation of the parties at the time of entering into the agreement. *Hadley* v. *Baxendale*, 9 Ex. 341; *Cory* v. *Thames, etc. Co.*, L. R. 2 Q. B. 181; *Horne* v. *Midland Ry.*, L. R. 7 C. P. 583. Whether, under the circumstances of the principal case, the general rule is to be applied is left in doubt by the authorities. The difficulty arises from another rule of damages, much cited, which requires that the loss be shown with certainty. *Rice* v. *Rice*, 104 Mich. 371. In consequence of this, it has often been said that the loss of profits can never be shown as an item of damage, since profits are by nature uncertain. *Griffin* v. *Colver*, 16 N. Y. 489; *Howe Machine Co.* v. *Bryson*, 44 Iowa, 159. However, many decisions hold that profits are provable in proper cases. *Dennis* v. *Maxfield*, 92 Mass. 138; *Wolcott* v. *Mount*, 30 N. J. Law, 262. The latter cases are based upon the better conception of the rule requiring certainty: that it merely expresses the elementary principle that a party must prove his damages by a preponderance of evidence. *Allison* v. *Chandler*, 11 Mich. 542. Accordingly, the principal case is correct in holding that there is no special rule for profits.

DAMAGES — TORTS — REMOTENESS. — The plaintiff purchased a ticket on the representation of the defendant's agent that the train would make connection at M. It did not, and the plaintiff, in order to reach her destination that day, drove eight miles. *Held*, that the plaintiff cannot recover for illness caused by the drive and exposure to a rainstorm on the way. *Foulks* v. *Southern Ry. Co.*, 32 S. E. Rep. 464 (Va.).

The court proceeds upon the ground that the illness was too remote, since it could not reasonably have been anticipated at the time of the agent's wrongful act. This limitation to the right to damages in such cases finds some support in the authorities. *Hobbs* v. *London, etc. Ry.*, L. R. 10 Q. B. 111. But the weight of authority is in favor of the sounder rule that damages may be recovered for all natural and proximate consequences of the wrongful act, whether they could be supposed to have been in the contemplation of the parties or not. *Brown* v. *Chicago, etc. Ry.*, 54 Wis. 342; *McMahon* v. *Field*, 7 Q. B. D. 591. In the principal case the negligence of the agent forced the plaintiff to drive to her destination; the exposure and subsequent illness were direct and natural results of the drive, and the defendants should have been held to answer for them. *Pickens* v. *South Carolina, etc. R. R. Co.*, 32 S. E. Rep. 567 (S. C.).

EVIDENCE — RES GESTA. — In a prosecution for using profane language, evidence was introduced that while committing the offence the defendant attempted to strike X. *Held*, that the evidence is admissible as part of the *res gestæ*. *Watson* v. *State*, 50 S. W. Rep. 340 (Tex., Cr. App.).

Res gestæ is sometimes used to describe facts that form a part of the general story of the crime or breach of duty to be inquired into. *Agassiz* v. *London Tramway Co.*, 21 W. Rep. 199; 1 Stark. Ev. 1st ed., 39. The witness in testifying is not restricted to stating the bare fact in issue, but may detail the surrounding circumstances. However, the better and more generally accepted sense in which the term is used is to describe that exception to the rule against hearsay admitting statements which are a part of some fact or transaction in itself admissible. *Waldele* v. *New York, etc. R. R. Co.*, 95 N. Y. 274. It does not clearly appear in which sense *res gestæ* is used in the principal case; but the decision is only intelligible by giving to the term the first meaning. It could not be contended that a hearsay statement was admissible, because it was in regard to a fact which happened at the time of the fact in issue. See 11 HARV. LAW REV. 343.

EVIDENCE — WITNESSES — PRIVILEGED COMMUNICATIONS. — The defendant questioned a witness as to confidential communications made to him, in the capacity of attorney, by the plaintiff. Over objection the court forced the plaintiff to assert or waive his privilege in person, and the latter allowed the questions to be put. *Held*, that there is no error. *McCooe* v. *Dighton, etc. Ry. Co.*, 53 N. E. Rep. 133 (Mass.). See NOTES.

FEDERAL COURTS — FORCE OF STATE DECISIONS. — A United States statute provides that the laws of the several States shall be the rules of decision in trials at common law in the federal courts. *Held*, that a federal court is not bound by the only case in point decided in the supreme court of the state many years before and since repeatedly doubted. *Stowe* v. *Belfast Savings Bank*, 92 Fed. Rep. 90 (Cir. Ct. Me.).

The United States Courts allow themselves great freedom in deciding what is the law of any state. Though they will always follow a line of uniform decisions in the supreme court of the state they will not be absolutely bound on a point on which the courts do not agree, or when there are but few cases in point, the doctrines of which are of doubtful soundness. *Burgess* v. *Seligman*, 107 U. S. 20; *Gelpcke* v. *Dubuque*, 1 Wall. 175. Such decisions, therefore, are only obligatory on the federal courts to the extent they would be acknowledged to be in their own jurisdictions. *Day* v. *James*, 8 Wheat. 495, 542. The principal case is, therefore, clearly sound. See 8 HARV. LAW REV. 328.

MUNICIPAL CORPORATIONS — EXCLUSION OF NON-UNION LABOR. — A board of education restricted the bidding for work on public building so as to exclude non-union labor. The cost of the work was thereby much increased. *Held*, that the restriction is invalid. *Adams* v. *Brenan*, 52 N. E. Rep. 314 (Ill.).

The question, whether it is within the discretionary powers of a municipal corporation to exclude non-union men from employment on public works if resulting in increased expense, seems rarely to have been judicially treated. The decision in the principal case is obviously correct. Whatever may have been the object of this board of education in favoring trade-unions, and whether or not the result would be for the general public advantage, it was hardly in the line of their official business to expend public money for this purpose. The primary duty to the public was to secure the most advantageous contract possible for accomplishing the work under their direction, and any regulation which prevented the attainment of this end was clearly invalid. For a similar expression of opinion on this question see *Lynch* v. *Josiah Quincy*, "Boston Advertiser," Jan. 26, 1898, Superior Ct, Richardson, J.

PRACTICE — JUDICIAL INITIATIVE. — In an action for personal injuries the trial justice asked leading and suggestive questions which would not have been competent if asked by the plaintiff's counsel. *Held*, that a reversal is warranted. *Bolte* v. *Third Ave. Ry. Co.*, 56 N. Y. Supp. 1038 (Sup. Ct., App. Div., First Dept.). See NOTES.

PROPERTY — DEEDS — ACCEPTANCE. — *Held*, that where a deed, delivered to a third party for the grantee, is clearly beneficial to the latter, his acceptance is presumed in the absence of actual dissent. *Wenster* v. *Folin*, 56 Pac. Rep. 490 (Kan., Sup. Ct.).

The question is important as affecting the interests of intervening third parties. The principal case is probably in accord with the numerical weight of authority. *Mitchel* v. *Ryan*, 3 Ohio, 377; *Myrover* v. *French*, 73 N. C. 609. The contrary view, that an actual acceptance is necessary in a deed, as in any other contract, and that it is absurd to presume such an acceptance where the grantee does not know that the deed exists, is ably presented in *Welsh* v. *Sackett*, 12 Wis. 243, and is supported by considerable authority. 2 Jones, Real Property in Conveyancing, § 1276. The weak point in the reasoning of the latter cases is that a conveyance is not generally regarded as a contract. It contains no agreement, and there cannot be a breach. The law finds no difficulty in raising a presumption of acceptance where the grantee is an infant or insane, and may well do so in such a case as the present one, if a better working rule is gained thereby.

PROPERTY — DEEDS — BOUNDARIES. — Land was described in a deed of conveyance as bounded in part "by the southeasterly side of Bloomingdale Road." *Held*, that the fee to the middle of the road is not included. *Deering* v. *Reilly*, 56 N. Y. Supp. 704 (Sup. Ct., App. Div., First Dept.).

When land is described in a deed as bounded on a highway, there is always a presumption that the fee to the middle of the way is intended to pass. 1 Jones, Real Property in Conveyancing, § 484 *ff.* Even where the side of the way is expressly designated, the weight of authority, in opposition to the principal case holds that this presumption is not rebutted. *Cox* v. *Freedley*, 33 Pa. St. 124; *O'Connell* v. *Bryant*, 121 Mass. 557. *Contra*, *Buck* v. *Squiers*, 22 Vt. 484. In the former cases the departure in construction from the more strict and natural meaning of the grantor's language seems well advised, for it is extremely improbable that the grantor should actually intend to reserve for himself a narrow strip of isolated land, which would be of no particular value to any one but the adjoining owner.

PROPERTY — FEE SIMPLE CONDITIONAL — POSSIBILITY OF REVERTER. *Held*, that the possibility of reverter on failure of a fee simple conditional is devisable as "a right of entry for a condition broken" within the meaning of section 3 of the Wills Act. *Pemberton* v. *Barnes* [1899], 1 Ch. D. 544.

Since the Statute *De Donis* fee simples conditional have survived in England only in the case of copyhold estates held of manors in which there is no custom to entail. The nature of the possibility of reverter which remains in the grantor has, therefore, received little consideration. The actual decision of the principal case seems reasonable

enough, but the *obiter* discussion of the question whether or not the possibility of reverter is an estate in the land is of more interest. If it is an estate it is alienable *inter vivos*, or devisable without the aid of such special language as the Wills Act contains. Otherwise it is, like the right of escheat, inalienable. North, J., admits that the little authority on the point is in conflict. In South Carolina, where the statute *De Donis* has never been in force and where, consequently, fee simples conditional still exist, it has been held that the possibility of reverter is not an estate, but as its name implies, only a possibility, "the mere remembrance of a condition upon which a present estate may be defeated, and a future one arise. *Adams* v. *Chaplin*, 1 Hill Eq. 265, 277. In most jurisdictions the question is of course only of speculative interest.

PROPERTY — FRAUDULENT CONVEYANCE. — A silk company executed a bill of sale of goods to a bank, as security for indebtedness, but retained possession of them. Creditors of the company subsequently attaching the goods, *held*, that the conveyance to the bank is conclusively presumed to be fraudulent since the vendor retained possession. *Hadden* v. *Dooley*, 92 Fed. Rep. 274. (C. C. A., Second Cir.).

There are two extreme views, many American and the earlier English cases holding with the principal case. *Hamilton* v. *Russel*, 1 Cranch, 309; *Colt* v. *Ives*, 31 Conn. 25; *Edwards* v. *Harben*, 2 T. R. 587. On the other hand, several American decisions of weight and the later English cases hold that under these circumstances fraudulent intent is a question of fact for the jury. *Ball* v. *Loomis*, 29 N. Y. 412; *Brooks* v. *Powers*, 15 Mass. 244; *Martindale* v. *Booth*, 3 B. & A. 498. There can be no doubt that the latter cases reach the better result. Constructive fraud has a place in the law of fraudulent conveyances only when defrauding creditors is a necessary consequence of the act done. Retention of possession, however, has by no means that inevitable result. Nor does policy demand the artificial rule contended for. Accordingly, upon principle, the present case can hardly be supported.

PROPERTY — LICENSE — INTERRUPTION BY THIRD PARTY. — A parol license was given to maintain a sewer through the licensor's land. *Held*, that the licensee can recover damages from a third person for interfering with the sewer. *Miller* v. *Inhabitants of Greenwich*, 42 Atl. Rep. 735 (N. J., C. A.).

This decision, which may be regarded as sound, shows the inaccuracy of the statement that such a license is "merely an excuse for a trespass"; a statement often given as a reason for holding that licenses are revocable. *Wiseman* v. *Lucksinges*, 84 N. Y. 31. There is a great dearth of authority on the exact point presented in the principal case, which, however, reaches a satisfactory result in viewing the licensee as practically a tenant at will of the right of drainage. *Ottawas Gaslight Co.* v. *Thompson*, 39 Ill. 598 (*semble*). A parol license will not bind the licensor, because of the Statute of Frauds. That is not a reason, however, for protecting third persons, who seek to prevent an exercise of his legal right by the licensee, and the latter should be allowed to maintain an action on the case for such interference with his lawful acts.

PROPERTY — LIFE TENANT — PERMISSIVE WASTE. — *Held*, that a life tenant is not liable to the remainderman for the destruction of a house on the estate by accidental fire. *Sampson* v. *Grogan*, 42 Atl. Rep. 712 (R. I.).

This case raises the question of the extent of a life tenant's liability for permissive waste. In England, the weight of authority seems to have been that a life tenant was liable for all permissive waste. *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Yellowley* v. *Gower*, 11 Ex. 274. But the question was never entirely free from doubt. *In re Cartwright*, 41 Ch. D. 532. Any liability for accidental fires, which may have existed in England was removed by statute in 1707. Only in a few of the states is this statute in force, and where it is not the point raised by the principal case seems never to have been directly adjudicated. The long continued silence of American courts on the subject gives considerable weight to the view taken, that a tenant for life has never been liable in this country for loss by accidental fire. 4 Kent, Com., 82. Historical considerations aside, the substantial justice of the decision cannot be questioned.

PROPERTY — PERCOLATING WATERS — RIGHT TO WITHDRAW. — The city built extensive wells which drew off the water percolating through the plaintiff's land, thus rendering it unfit for crops. *Held*, that the defendant is liable for the damage done. *Porbell* v. *City of New York*, 56 N. Y. Supp. 790 (Sup. Ct., Sp. Term.).

This decision is *contra* to *Chasemore* v. *Richards*, 7 H. L. Cas. 349, but follows the only American case in which the exact point has been adjudicated. *Smith* v. *City of Brooklyn*, 46 N. Y. Supp. 141. The court lays down the general doctrine that the right to percolating water comprises only the right to use it on the owner's land. But by the weight of authority the right to such water is absolute. *Acton* v. *Blundell*, 12 M. & W. 324; *Chatfield* v. *Wilson*, 28 Vt. 49. And, moreover, while the principal case asserts that it is the subject of correlative rights it rejects the only logical conclusion,

namely, that the reasonableness of the user is the measure of those rights. *Bassett* v. *Salisbury Mfg. Co.*, 43 N. H. 569. The actual result, however, accords with the view taken by the New Hampshire court, and in a jurisdiction where the question is still open that view might well be followed. The ends of practical justice and convenience can only be reached by restricting to reasonable limits the right to use percolating water, nor does such restriction seem inconsistent with the landowner's natural rights.

PROPERTY — STATUTE OF LIMITATIONS — ADVERSE USE. — In an action for the recovery of land which the defendant had taken possession of and occupied under a mistaken belief that it was his own, *held*, that the Statute of Limitations did not begin to run against the plaintiff until the defendant had made a claim of ownership other than the mere occupation of the land, and notice of the claim had been brought to the knowledge of the plaintiff. *Conrad* v. *Sackett*, 56 Pac. Rep. 507 (Kan., C. A.).

The doctrine of this case obtains in several jurisdictions in the United States. *Gilchrist* v. *McLaughlin*, 7 Ired. 310; *Grube* v. *Wells*, 34 Iowa, 148. It is generally held, however, that if one takes possession of and occupies land of another as his own his possession is adverse, irrespective of whether he knew at the time of his entry that the land belonged to some one else or honestly thought it was his own. If he continues such occupation for the statutory period he thus acquires an indefeasible title. *French* v. *Pearce*, 8 Conn. 439; *Sumner* v. *Stevens*, 47 Mass. 337. This view of what constitutes adverse possession is certainly more in conformity with the object of the statute. If the true owner by his laches permits the property to remain out of his control for the statutory period he should not then be heard to complain.

TORTS — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. — The plaintiff, a brakeman, was injured while passing under a bridge on the defendant's cars. In an action to recover therefor, *held*, that the burden of establishing that he was exercising due care is on the plaintiff. *Williams* v. *Delaware, etc. R. R. Co.*, 57 N. Y. Supp. 203 (Sup. Ct., App. Div., Fourth Dept.).

The declaration in an action to recover damages caused by the defendant's negligence contained no allegation of the plaintiff's due care. On demurrer, *held*, that the declaration is sufficient. *Brother's Admr.* v. *Rutland R. R. Co.*, 42 Atl. Rep. 980 (Vt.).

The weight of authority is against the first case and the decisions are not unanimous as to the second; but both cases seem sound on principle. The question of lack of due care on the plaintiff's part was put in issue under the Hilary Rules by the plea of not guilty. *Bridge* v. *Grand Junction R. R. Co.*, 3 M. & W. 244. The burden is upon him to show that the defendant's negligence was the legal cause of the injury, which is equivalent to proving that want of due care by the plaintiff was not a part of that cause. *Bower* v. *Danville*, 53 Vt. 183. However, it is only necessary that the declaration should show a duty owing from the defendant and a breach of that duty. It is not essential that it allege absence of negligence on the part of the plaintiff, as such allegation is involved in the averment that the injury complained of was occasioned by the defendant's negligence. *Lee* v. *Troy, etc. Co.*, 98 N. Y. 115.

TORTS — INJURY TO DOG. — *Held*, that the owner of a dog can recover damages for negligent injury thereto. *Salley* v. *Manchester & A. R. Co.*, 32 S. E. Rep. 526 (S.C.).

This decision is doubtless correct and is in accord with the great weight of authority. *Ten Hopen* v. *Walker*, 96 Mich. 236; *St. Louis, etc. Ry. Co.* v. *Stanfield*, 63 Ark. 643; *Citizens, etc. Co.* v. *Dew*, 100 Tenn. 317. An opposite view was taken in *Jemison* v. *Southwestern R. R.*, 75 Ga. 444. At common law a dog was not the subject of larceny because, it was said, there could be no property in it. *Findlay* v. *Bear*, 8 S. & R. 571. Nevertheless, at an early date, it was held that there was sufficient property in a dog to enable the owner to maintain a civil action for damages thereto. Bro. Abr., tit. Trespass, 407. Clearly it should be so held to-day in view of modern conditions of life and the fact that dogs are very generally the subject of taxation.

TRADE MARKS — GEOGRAPHICAL NAMES — INJUNCTION. — The defendant, a watch manufacturer in Waltham, used the word "Waltham" upon the plates of his watches without any addition distinguishing them from watches made by the plaintiff. *Held*, that he may be enjoined from so doing, the word by long use having come to designate to the public generally the plaintiff's watches. *American Waltham Watch Co.* v. *United States Watch Co.*, 53 N. E. Rep. 141 (Mass.).

The rule laid down in the present case, restricting the use of the name of a geographical district as a trademark when it has become identified with the goods of a plaintiff, is supported by the great weight of authority. *Seixo* v. *Provezende*, L. R. 1 Ch. 192; *Montgomery* v. *Thompson*, [1891] App. Cas 217. It is well settled that such a designation cannot be appropriated as a trade name when used only in its primary sense. *Gage-Downs Co.* v. *Featherbone Corset Co.*, 83 Fed. Rep. 213, 214. By long continued application to the goods manufactured by a certain person, however, the

name may acquire a secondary significance, as in the present case, and instead of merely standing for the place where the goods are manufactured, it may become a mark denoting the manufactured goods themselves. In such cases equity will enjoin the indiscriminate use of the word by others engaged in the same business, it being in fact a false representation to the public that the goods sold are the plaintiff's make.

TRUSTS — INSOLVENCY OF TRUSTEE — PREFERENCE OF CESTUI. — A trustee deposited trust funds in his own name in a bank with money of his own. The trustee and bank both failed. *Held*, that the *cestui que trust* is not entitled to a preference over the other creditors of the trustee for the amount of the trust fund. *Shute* v. *Hinman*, 56 Pac. Rep. 412 (Oreg.).

If a trustee becomes insolvent, having misappropriated the trust fund, the *cestui* is entitled to a preference over the other creditors only if he shows that the assets of the bankrupt have been increased by the misapplication of the fund, and then only to the amount of such increase. *Harrison* v. *Smith*, 83 Mo. 210; *Ellicott* v. *Brown*, 31 Kan. 170. When it has been so proved, it would be clearly inequitable for the other creditors to derive any advantage from such increase, while, if the assets have not been increased, it would be equally unjust to give the *cestui* a preference. *Cavin* v. *Gleason*, 105 N. Y. 256. The present case is undoubtedly correct. By the reason of the failure of the bank it is evident that the assets of the bankrupt trustee were not increased by the full amount of the trust fund, and it does not appear that the plaintiff had shown to what amount, if any, the assets had been increased.

REVIEWS.

THE LAW OF PARTNERSHIP, INCLUDING LIMITED PARTNERSHIPS. — By Francis M. Burdick, Dwight Professor of Law in Columbia University School of Law. Boston: Little, Brown & Co. 1899. pp. lii, 422.

The merchants continue in their book-keeping and in other ways to treat the firm as an entity, while the lawyers and the courts continue the effort to bring this mercantile relation into conformity with the principles of the common law relating to joint ownership and joint liability.

But consistent enforcement of those principles is so incompatible with the nature of partnership that the recognition of the firm as an entity is unconsciously made in many cases in which the decision is reconcilable with no other view of partnership than that adopted by the mercantile world. A few courts are bold enough to speak of the firm as an entity, but others, while shrinking with horror from the use of the word "entity," compromise with their scruples by describing a partnership as "a concern" — *Bailey* v. *Hornthal*, 154 N. Y. 648, 659 — or as an "entirety." *Bratt* v. *McGuinness*, 53 N. E. 380 (Mass.).

Professor Burdick does not attempt a solution of the problem, but he states concisely and clearly the different views. His book is a valuable addition to existing works on partnership. Lindley on Partnership, Bates on Partnership, Beale's Edition of Parsons on Partnership, and Story's treatise with the notes by Gray and by Wharton are more useful to the practitioner than to the young student, although of service to the latter also. The last edition of Pollock on Partnership, a less elaborate work, is only a commentary on the Partnership Act of 1890 with illustrative cases.

Professor Burdick's book is the only short American work on the subject, and it is a pleasure to find it so admirably adapted to the purpose for which it was written, if that purpose can be accomplished by the use of any text-book. The principles, as found in the decisions, are clearly stated and the cases cited are well chosen.

But in our opinion it will be a hard, dry task to learn the law of Partnership by the study of even so well written a book as Professor Burdick's.